

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1292

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
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CERALDO MARTINEZ, :
:
Defendant-Appellant. :
:
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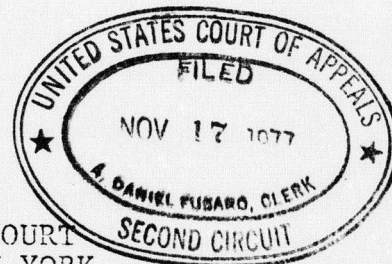
Docket No. 77-1292

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

GERALDO MARTINEZ,

Defendant-Appellant.

Docket No. 77-1292

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the court's instruction on "admissions" invaded the province of the jury on the only issue in the case -- whether appellant was correctly identified as the drug seller.

2. Whether appellant was deprived of the effective assistance of counsel by his attorney's failure to raise a clearly meritorious speedy trial claim as well as his inept performance at trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Henry F. Werker) rendered on June 15, 1977, after a jury trial, convicting appellant of two counts of distributing and possessing with intent to distribute cocaine (Counts I and II) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)). Appellant was sentenced to concurrent terms of 10 years' imprisonment with a special parole term of five years.

By order of this Court dated July 8, 1977, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. Introduction

Appellant Martinez was charged in a two-count indictment (76 Cr. 766)* with distributing and possessing with intent to distribute cocaine on June 18 (Count I) and July 1, 1974 (Count II). The case proceeded to trial on May 2, 1977. The key issue at trial was identification, and appellant presented an

*The indictment is reproduced as B to the separate appendix to appellant's brief.

alibi defense.

B. Pre-trial Delay

On April 9, 1975, a complaint and an arrest warrant were filed* charging appellant with violations of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A), based upon an alleged sale of cocaine on July 1, 1974.** Pursuant to the arrest warrant, appellant was arrested by DEA agents in Chicago, Illinois, on April 28, 1975, and appeared the following day before United States Magistrate Sussman.*** On May 6, 1975, appellant posted \$500 as security on a \$5,000 bond and was released. See Appendix F.

On May 14, 1975, Magistrate Sussman ordered appellant's case to be transferred to the Southern District of New York for prosecution. Appellant's bond was forwarded to New York to secure his appearance there when requested. See Appendix G. On July 9, 1975, Assistant United States Attorney Engel informed Agent Rose that, because of "an extremely heavy case-load," he was referring the case to the New York State Special Narcotics Court for prosecution (see GX 3509, reproduced as Appendix H). On the motion of Assistant United States Attorney

*The complaint and warrant are reproduced as D to the separate appendix to appellant's brief.

**Agent Rose, who signed the complaint, had been present at the drug transaction on June 18, 1974.

***The report of DEA agent Keith Leoni, dated May 16, 1975, detailing the arrest and court appearances, is reproduced as E to the separate appendix to appellant's brief.

Engel, the complaint was dismissed on July 14, 1975. See Appendix I. Appellant's bond remained in force, and the United States Attorney did not consent to the return of the bail money until June 20, 1977, the week after appellant's sentencing on the indictment. See Appendix J.

New York State failed to initiate the prosecution, and appellant was indicted in the Southern District of New York on August 17, 1976. On August 26, 1976, the prosecutor appeared in court and stated that appellant was then in Chicago and had only been notified of the court date the previous day. At the Government's request, the case was adjourned until September 2, 1976. No new bail was set. See minutes of August 26, 1976, at 1-2.

On December 15, 1976, appellant Martinez made his first court appearance on the indictment. Because he had no lawyer,* Judge Werker referred the case to a magistrate for the assignment of counsel. The prosecutor informed the court that two attorneys (neither of whom formally appeared in the case) had called him to request adjournment of an unspecified pre-trial conference. One of the attorneys had told him that appellant's family could not locate him because he was a truck driver on the road (Minutes of December 15, 1976, at 2-4).

On January 11, 1977, appellant's recently-assigned counsel

*There was no interpreter present, and appellant told the court that he could understand English "a little bit." Minutes of December 15, 1976, at 2.

appeared, although appellant was not present.* The lawyer was given access to the Government's entire investigatory file and requested the court to set a trial date, suggesting February 15 (Minutes of January 11, 1976, at 5). In response to the court's inquiry as to the speedy trial period, the Government replied that the period began on August 26, 1976. The court and the prosecutor agreed that the three and one-half months during which appellant was without counsel were excludable (Minutes of January 11, 1977, at 3-5).

On February 4, 1977, the Government filed notice of its readiness for trial on or after February 7, 1977. Appellant was arrested in Illinois on state charges during April, and was produced on a writ of habeas corpus ad prosequendum in the instant case on May 2, 1977. At that time, counsel requested a two-week adjournment for the purpose of locating his alibi witnesses. Counsel explained that on June 18, 1974, appellant had been at the apartment of a casual acquaintance named Mr. Charles at West 111th Street between St. Nicholas and Seventh Avenues. In the three years since that time, the building had burned down and Mr. Charles's whereabouts were unknown (2-3, 5**). The court denied the motion and the trial began on that day (7-8).

*Appellant flew to New York from Chicago on that date, and appeared after the conference had concluded (Minutes of January 11, 1977, at 2).

**Numerals in parentheses refer to pages of the trial transcript dated May 2-4, 1977.

C. The Government's Case

The prosecution's case rested upon the testimony of Paul Wolfert (the informer who set up the transactions), Juan Rodriguez (the undercover agent who purchased the drugs), and various DEA agents who surveilled one or both of the transactions.

Paul Wolfert had become an informer following his arrest for possession of narcotics with intent to distribute.* In return for cooperation with the authorities, Wolfert was permitted to plead guilty to possession of cocaine, and was sentenced by Judge Werker to five years' probation (22-25). The Government paid Wolfert \$7,500 for one year's services (25). On June 14, 1974, Wolfert met the drug seller (allegedly appellant) at the home of a mutual friend (25-26). Upon the seller's promise that he could supply cocaine, a transaction was arranged for June 18, 1974, at Rodney's Bar on 13th Street. With Agent Rose observing, the informer introduced undercover officer Rodriguez to the drug seller, who vouched for the quality of the

*Shortly after Wolfert began testifying, the court interrupted to ask appellant:

Mr. Martinez, do you know what Mr. Wolfert is saying?

THE INTERPRETER: He doesn't understand, sir. However we had an understanding that any time he wanted something I have been instructed by defense counsel any time he wants something he can ask me and I will tell him.

Judge Werker informed the interpreter of his function in the courtroom and had the prosecution begin the direct examination again (23-24).

cocaine (47-49). Before the money and drugs were exchanged, Rodriguez, Wolfert, and the seller moved out of sight of the surveillance officer (30-33). The informer and the drug seller walked to Christopher Street, where they separated; DEA Agent Tuerack saw them walk by, and Agent Sweikert followed the two for a short distance (105-106).

A second transaction took place on July 1, 1974, at the Under the Stairs Lounge. While Agent Tuerack watched, the drug seller met Rodriguez and Wolfert in the club, claimed he had missed his connection, and left (34-35). He returned a short time later with two men and a sample of the cocaine, which he showed to Wolfert and Rodriguez in the toilet. The seller then left for another 45 minutes, returning with one of his earlier companions. In the toilet, Rodriguez handed the seller \$900 for the cocaine. Because the agent still owed \$100 for the drugs, the seller wrote his phone number on a napkin. Rodriguez lost the napkin, but claimed that the phone number was the same one the seller had provided to Wolfert (63-64, 70).

At trial, appellant was identified as the drug seller by Rodriguez and Agents Rose, Sweikert, and Tuerack on the basis of their brief observations three years earlier. None of the agents had observed him on more than two occasions* nor more

*Agent Rose stated on cross-examination that he had seen appellant "[i]n person two occasions and I saw a photograph of him once" (75). Counsel did not request a Wade hearing, nor did he determine whether the other witnesses had seen appellant's photograph or ascertain the circumstances of the identification.

recently than July 1974. The agents observed him in the "dark" street (105) or in the "dim" light of the two bars (64-65). Agent Sweikert had not come within 30 feet of the drug seller. Only Rodriguez saw the drug seller in the "bright" light of the men's room of the Under the Stairs Lounge (67). The agents contradicted one another as to whether the seller wore a goatee (65, 75, 107). The cross-examination of all five identification witnesses covers only 11 pages of the record (Wolfert, 41-43; Rodriguez, 64-66; Rose, 75; Sweikert, 104-108; Tuerack, 122-123).

D. The Defense

Appellant Geraldo Martinez, who had been convicted in Illinois of selling drugs in 1975, testified in his own defense (138). On June 18, 1974, he had gone swimming in Newark, where he lived at the time. At 7:00 p.m., he visited a friend in Englewood, New Jersey, and spent the night there. On July 1, 1974, appellant met with a mechanic friend at 111th Street between St. Nicholas and Seventh Avenues from 11:00 a.m. until 1:00 p.m. Then appellant and his friend went to the Bronx to speak to a man about a mechanic's job in which appellant was interested. At 6:00 p.m. they returned to the 111th Street apartment, where they played dominoes until 2:00 the next morning (127-130). Appellant did not know the informer or any of the agents who testified against him (130-131).

Although the informer and the agents had seen the person

identified as the drug seller driving a car with license plates registered to appellant at 219 Shepard Avenue in Teaneck, New Jersey (69-70, 76, 94, 104), appellant explained that the car was not his. The vehicle belonged to a Mrs. Williams,* who lived at that address and with whom he had had a romantic encounter. She registered the car in appellant's name to prevent her husband from finding out about it, and appellant had never seen the vehicle (131-132).

E. The Charge**

Appellant made no post-arrest admissions. However, the court gave the following instruction with respect to the drug seller's statements at the time of the two transactions:

You have heard evidence of statements made by the defendant on two different occasions concerning the sale of cocaine.

(177).

.

The admissions of the defendant or the incriminating statements made or acts done by the defendant outside of court are among the most effectual proofs in the law and and constitute the strongest evidence against the party making it that can be given of the facts stated in the admissions.

Accordingly, you are entitled to give great weight to the defendant's admissions

*The telephone number the drug seller had allegedly given to the informer and the undercover agent was that of Mrs. Williams at 219 Shepard Avenue (63, 78-79).

**The complete charge is reproduced as C to the separate appendix to appellant's brief.

in this case.

(178).

Defense counsel objected to this instruction at the time the prosecutor requested it,* and took exception following the charge (140-141, 100, 192).

Counsel failed to request (or to object to the absence of) an instruction that the informer's testimony should be scrutinized with special care and caution. He also failed to object to the charge that, in assessing credibility, the jurors should consider how "it fit[s] in with the other evidence in the case which you do believe and other facts you find to have existed. Does it jibe with that evidence and those facts?" (184-185).

F. Verdict and Sentence

The jury returned a verdict of guilty on both counts (193). Appellant was sentenced on each count to 10 years' imprisonment plus a special parole term of five years, the sentences to run concurrently (Minutes of June 15, 1977, at 4).

*The prosecutor's request to charge is reproduced as Appendix K of the separate appendix to appellant's brief.

ARGUMENT

Point I

THE COURT'S INSTRUCTION ON ADMISSIONS
INVADED THE PROVINCE OF THE JURY ON THE
ONLY ISSUE IN THE CASE -- WHETHER APPEL-
LANT WAS CORRECTLY IDENTIFIED AS THE
DRUG SELLER.

Over the repeated objection of defense counsel (100, 140-
141, 192), the court delivered the following instruction on
"admissions:"

You have heard evidence of statements
made by the defendant on two different
occasions concerning the sale of cocaine.

(177).

. . . .

The admissions of the defendant or the
incriminating statements made or acts done
by the defendant outside of court are among
the most effectual proofs in the law and
constitute the strongest evidence against
the party making it that can be given of
the facts stated in the admissions.

Accordingly, you are entitled to give
great weight to the defendant's admissions
in this case.

(178).

This instruction did not pertain to any post-arrest admissions,
for appellant had made none, but to the drug seller's conversa-
tion during the two transactions. Since the defense was alibi,
this charge effectively removed the only issue from the jury's
consideration.

In United States v. Grunberger, 431 F.2d 1062, 1069 (2d

Cir. 1970), reversible error was found in a court's instruction that the defendant's statement to a Customs agent was "an out of court admission." There, the agent had testified that when confronted with the contraband, the defendant had declared, "This is illegal." The defendant claimed that he had posed the remark in the form of a question. By describing the defendant's words as an admission, the judge "usurped the function of the jury as a fact-finder and allowed his view, the prosecution view, of the sharply disputed purport of this evidence to be the only view the jury should consider." United States v. Grunberger, supra, 431 F.2d at 1069.

The court's instruction in the instant case was far more prejudicial than that in Grunberger. By informing the jury that the words of the drug seller were the "admissions" of appellant, the court was bluntly stating that appellant was correctly identified as the culprit. The jurors were not told that if they believed the alibi or had a reasonable doubt concerning the identification testimony, then the drug seller's statements were not the defendant's admissions at all. See Grunberger, supra, 431 F.2d at 1069. On the contrary, the court charged that the "incriminating statements made or acts done by the defendant outside of court are the most effectual proofs in the law and constitute the strongest evidence against the party making it that can be given of the facts stated in the admissions."* This charge would have been improper even

*The prosecutor requested this instruction based upon the

for a post-arrest admission or confession, in which case the jurors must be instructed to give the evidence "such weight as the jury feels it deserves under all the circumstances." United States v. Barry, 518 F.2d 342, 348 (2d Cir. 1975); 18 U.S.C. §3501(a).

The charge on "admissions" usurped the function of the jury and "conveyed to the jury too strong an impression of the court's belief in the defendant's probable guilt to permit the jury freely to perform its own function of independent determination of the facts." United States v. Persico, 349 F.2d 6, 10 (2d Cir. 1965); United States v. DeSisto, 289 F.2d 833, 835 (2d Cir. 1961). The error mandates a new trial.

(Footnote continued from the preceding page)

authority of Wilson v. United States, 162 U.S. 613 (1896), which dealt with post-arrest false exculpatory statements. The Government extracted dictum relating to "a deliberate, voluntary confession of guilt" and substituted the word "admissions" for "confessions." The prosecutor carefully omitted the language that "from its very nature such evidence should be subjected to careful scrutiny and received with great caution" (*id.* at 622), but retained only the language concerning the strength of the evidence. See Appendix K, Government's Request to Charge.

Point II

APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO RAISE A CLEARLY MERITORIOUS SPEEDY TRIAL CLAIM AS WELL AS HIS INEPT PERFORMANCE AT TRIAL.

Approximately 22 months elapsed between the filing of the complaint and the filing of the Government's notice of readiness. Despite the clear violation of the Southern District Plan for the Prompt Disposition of Criminal Cases ("the Plan"), counsel did not make a motion to dismiss on this ground. Nor did he raise a Sixth Amendment speedy trial issue, although the defense had been impaired by the delay. These failings were compounded by the attorney's inept performance at the trial. This lack of effective assistance of counsel was "of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice." United States v. Bubar, Docket No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977).

The Plan provides that "[i]n all cases the government must be ready for trial within six months from the date of the ... filing of a complaint...."* In the instant case, the period begins to run on April 9, 1975, and ends on February 4, 1977, when the Government filed its notice of readiness. The 22-month delay

*Three different plans have been in effect between the time of the filing of the complaint and the Government's notice of readiness. The six-month rule is retained in all three.

in the instant case may be explained as follows:

April 9, 1975	Filing of complaint.
April 28, 1975	Arrest upon complaint.
May 6, 1975	Defendant released on bond.
May 14, 1975	Case transferred to the Southern District of New York.
June 2, 1975	Defendant's bond forwarded to the Southern District of New York to secure his appearance when requested.
July 14, 1975	Complaint dismissed on motion of U.S. Attorney.
July 1975- August 1976	Because of "heavy caseload," U.S. Attorney refers case to New York District Attorney. Defendant remains on bail.
August 17, 1976	Indictment filed in Southern District of New York.
August 26, 1976	Prosecution appears without defendant, who was notified in Chicago the day before. Case adjourned to September 2, 1976.
December 15, 1976	Defendant's first appearance following indictment. Case referred to a magistrate for assignment of counsel. No new bail set.
January 11, 1977	Counsel appears and requests February trial date.
February 4, 1977	Filing of Government's notice of readiness.
May 2-4, 1977	Trial.
June 15, 1977	Sentence.
June 20, 1977	Defendant's bond exonerated.

Since the delay far exceeded the six-month period, the Government would have to demonstrate at a hearing that one of

the tolling provisions applied.* United States v. Flores, 501 F.2d 1356, 1359 (2d Cir. 1974). However, the record conclusively establishes that the delay involved violated the Plan. For example, a 13-month delay occurred because the United States Attorney could not proceed on the case because of "an extremely heavy caseload." See Appendix H. Thus, for more than a year the Government unsuccessfully urged that the New York County District Attorney undertake prosecution of the case. Although the complaint was dismissed in July 1975, appellant remained on bail between the time of the dismissal and the filing of the indictment in August 1976. Thus, the 13 months must be counted against the Government. See United States v. Cyphers, 556 F.2d 630, 636 (2d Cir. 1977); cf. United States v. Flores, supra, 501 F.2d at 1359-1360.** After the indictment in August 1976, the Government failed to secure appellant's appearance for four months from the date of the indictment -- until December 1976. Since appellant's address was known, he was not in hiding, and his bail remained in force, the Government was required to take affirmative action to produce him. See United States v. Salzmann, 548 F.2d 395, 400-401 (2d Cir. 1976); United States v. Oliver, 523 F.2d 253, 258-259 (2d Cir. 1975); 18 U.S.C. §3161(h)(3). A speedier arraignment would have enabled the court to determine

*Rule 10 of the Plan, which became effective July 1, 1976, provides that the periods of delay set forth in 18 U.S.C. §3161(h) shall be excluded. The prior plans had contained their own lists of excludable periods.

**Unlike the defendant in Flores, supra, 501 F.2d at 1359-1360, who was not subject to any disabilities following dismissal of the complaint, appellant remained on bail. Moreover, unlike Flores, there was never any doubt that appellant would be prosecuted. The only question was which jurisdiction -- state or federal -- would bring him to trial.

whether it was necessary to assign counsel to the defendant, as was ultimately done.* Since the Government cannot justify more than a minimal portion of the 22-month delay, a motion to dismiss based upon the Plan would have resulted in a dismissal of the indictment** with prejudice. The failure to raise this issue in a case where the Government's violation was so glaring can be viewed only as "woefully inadequate representation." Saltys v. Adams, 465 F.2d 1023, 1029 (2d Cir. 1972).

Counsel similarly failed to raise the issue of the denial of appellant's Sixth Amendment right to a speedy trial. In Barker v. Wingo, 407 U.S. 514, 530 (1972), the Supreme Court set forth four factors that must be considered: the length of the delay, the reason for the delay, the defendant's assertion of his right and the prejudice to the defendant. See

*The Court's finding that the four months during which appellant was without counsel were automatically excludable is incorrect. None of the Speedy Trial Plans provided for such an exclusion. The plans that became effective in 1973 and 1975, counted against the government any delay due to failure of the Court to provide counsel for an indigent defendant. See 1975 Plan, Rule 6(g); 1973 Plan, Rule 5(g).

**Although the complaint (Appendix D) charged only one of the two drug transactions alleged in the indictment, there was one continuing prosecution for speedy trial purposes. See Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965) (successive indictments charging the same mail fraud scheme but different mailings). Here, the DEA agent who signed the complaint had been present at the transaction not charged in the complaint, and the DEA report dated May 2, 1975 (Appendix L), makes clear that a single trial for both charges was intended. Even if the prosecutions could somehow be viewed as separate, defense counsel would have been no less incompetent for failing to raise the speedy trial issue.

United States v. Roberts, 515 F.2d 642, 645 (2d Cir. 1975). In the instant case, the four factors may be analyzed as follows:

(1) The 25-month delay between the filing of the complaint (April 9, 1975) and the commencement of trial (May 2, 1977) is certainly sufficient to trigger an inquiry. See United States v. Vispi, 545 F.2d 328, 333 (2d Cir. 1976) (20-month delay violated Sixth Amendment). (2) Most of the delay in this case is attributable to the Government's "inexcusable inefficiency" (United States v. Lane, Docket No. 77-1082, slip op. 5191, 5198 (2d Cir., August 8, 1977)) in expending more than a year trying to convince New York State to proceed with the prosecution and then taking four months to produce the defendant in court. Since the case against the defendant was "simple and uncomplicated" (United States v. Carini, Docket No. 77-1167, slip op. 5599, 5609 (2d Cir., August 30, 1977)), the delay was unjustifiable. (3) The defense attorney requested that trial commence one month after he was assigned to the case. Appellant's failure to make prior demands may be excused by the fact that, during the 13-month period prior to indictment, he could not have known whether to demand a trial of the state or the federal authorities. (4) As a result of the inordinate delay, appellant suffered extreme prejudice. First, he suffered the disability of awaiting trial on bond for two years. See Klopper v. North Carolina, 386 U.S. 213, 221-222 (1967); United States v. Vispi, *supra*, 545 F.2d at 335. Second, his defense was severely impaired because his alibi witnesses disappeared. See Barker v. Wingo, *supra*, 407 U.S. at 532. Counsel explained that one witness, Mr. Charles, had disappeared after his building burned down, and requested a two-week adjournment to locate him and the other missing witness. The defense could not

have been trying to fabricate a claim of prejudice arising from the delay because the attorney did not know that the issue existed. For a lawyer to be unaware of a Sixth Amendment claim when he knows that the defense has been severely impaired by a two-year delay is gross incompetence.

Counsel's failure to obtain a dismissal of the indictment prior to trial was exacerbated by his minimal efforts at the trial itself.* The prosecution's case rested upon the identification testimony of five persons, most of whom had had only a few brief glimpses of the culprit three years previously. Although extended questioning would necessarily have elicited inconsistencies in testimony, counsel engaged in a total of 11 pages of cross-examination of all five witnesses. Although it became apparent that one of the DEA agents had observed appellant's photograph on one occasion, counsel failed to "take even the rudimentary step" (Saltys v. Adams, supra, 465 F.2d at 1028) of requesting a Wade hearing to determine the circumstances of the identification or whether the other Government witnesses had also been shown appellant's photograph.

The defense attorney did not request (or object to the absence of) an instruction that the informer's testimony should be scrutinized with special care and caution. See United States v. Swiderski, 539 F.2d/859-860 (2d Cir. 1976). Nor did counsel object to the court's charge that, in assessing credibility, the jurors should consider how "it fit[s] in with the other

*The fact that counsel instructed the interpreter not to translate anything until appellant made a specific request should have alerted the court to the attorney's inadequacies (23-24).

evidence in the case which you do believe and other facts you find to have existed. Does it jibe with that evidence and those facts?" In a case with a single defense alibi witness and five prosecution witnesses who placed appellant at the scene of the crime, this instruction was prejudicial.

While the lawyer's errors at trial might not have been sufficient, by themselves, to establish ineffective assistance of counsel (see, e.g., United States v. Daniels, 558 F.2d 122 (2d Cir. 1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976)), when combined with his failure to raise a clearly meritorious speedy trial claim, the errors rise to the level of a "farce and mockery of justice."* Therefore, the conviction must be reversed and the case remanded.

*While we contend that counsel's performance was inadequate under the standard of United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950), we suggest that, if necessary, the court consider adopting the more liberal standard of United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 17, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the ~~Eastern~~^{Southern} District of New York.

Barry Bassin

